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In the Supreme Court of the United States

OCTOBER TERM, 1976

CIVIC AWARENESS OF AMERICA, LTD., ET AL., PETITIONERS

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioners, Civic Awareness of America, Ltd.,[1] and two individuals, brought this action for declaratory and injunctive relief in the United States District Court for the Eastern District of Wisconsin. They asserted that statutes authorizing federal expenditures for family planning services violate the Free Exercise and Establishment Clauses of the First Amendment and alleged that respondent Planned Parenthood Association of Milwaukee, a recipient of federal family planning grants, improperly engaged in abortion counseling.

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[1]Civic Awareness of America, Ltd., is a nonprofit Wisconsin corporation "associated for the purpose of upholding the principles of

The district court denied petitioners' motion to convene a three-judge court because it found the constitutional claims to be frivolous and insubstantial (Pet. App. 22-27; 343 F. Supp. 1358). The district court subsequently held that petitioners lacked standing to contest the activities of Planned Parenthood; the court therefore dismissed the action (Pet. App. 14-21; 387 F. Supp. 1086). The court of appeals affirmed (Pet. App. 10-12).

1. Petitioners' principal contention is that federal expenditures for family planning services violate the Free Exercise and Establishment Clauses of the First Amendment. The courts below correctly held that this claim is frivolous.

The statutes authorizing funding of family planning activities require that the receipt of family planning services funded by the federal government be strictly voluntary. See Section 1007, Public Health Service Act, as added, 84 Stat. 1508, 42 U.S.C. 300a-5, and Section 508, Social Security Act, as added, 81 Stat. 926, 42 U.S.C. 708. The district court correctly noted (Pet. App. 27):

> Both statutes are careful to insist on voluntary participation. Thus, there is no threat that plaintiffs will be compelled to learn about or exercise birth control.

Accordingly, petitioners' contention that the federal statutes infringe their right to free exercise of religion is insubstantial.[2] Similarly insubstantial is petitioners'

Judeo-Christian civilization and opposing artificial contraception, cloning, vasectomy, abortion and similar activities * * *" (Pet. 5).

[2]Moreover, while this Court has noted that the state may not "affirmatively oppos[e] or [show] hostility to religion, thus 'preferring those who believe in no religion over those who do believe'" (*School District of Abington Township* v. *Schempp*,

contention that the use of their tax dollars to support an activity that conflicts with their religious beliefs prohibits their free exercise of religion. *Tilton* v. *Richardson*, 403 U.S. 672, 689.

Nor does federal spending for family planning establish a religion by supporting an activity of which some persons may approve because it comports with their religious beliefs:

> [T]he "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy.

McGowan v. *Maryland*, 366 U.S. 420, 442 (upholding Sunday closing laws). In short, government subsidization of an activity does not amount to an establishment of religion merely because some religions may believe that activity to have religious significance.

2. Petitioners also contend that a federal family planning grant to Planned Parenthood was used for abortion

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374 U.S. 203, 225), the funding of family planning activities cannot be said to be hostile to religion because family planning is not offensive to most religions. In this respect, family planning is similar to the teaching of evolution in the public schools—although it may be offensive to some religions, it is not hostile to religion in general. See *Epperson* v. *Arkansas*, 393 U.S. 97,

counseling, in violation of Section 1008, Public Health Service Act, as added, 84 Stat. 1508, 42 U.S.C. 300a-6, which prohibits the use of such funds "in programs where abortion is a method of family planning." Petitioners asked that the Secretary of Health, Education, and Welfare be enjoined from making further grants to Planned Parenthood. The courts below did not reach the merits of petitioners' claim but instead correctly held that petitioners lacked standing to raise this issue, either as taxpayers or as parties "aggrieved by agency action" within the meaning of the Administrative Procedure Act, 5 U.S.C. 702.

In *Flast* v. *Cohen*, 392 U.S. 83, 102, this Court determined that the relevant inquiry for determining whether a taxpayer has standing to sue in that capacity is "whether there is a logical nexus between the status [of taxpayer] and the claim sought to be adjudicated." In particular, the Court held that a taxpaper has standing to raise a claim that a statute "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power * * *" (392 U.S. at 102-103).[3] In this case, there is no such claim which gives petitioners standing as taxpayers. Since petitioners' constitutional claim had previously been dismissed as insubstantial, petitioners were left with their claim that Planned Parenthood's activities are unlawful under the statute. This claim plainly does not fall within the rule in *Flast*.

In order otherwise to establish standing, a plaintiff must demonstrate "that the challenged action has caused him injury in fact, economic or otherwise."

[3]Beyond this limited situation, a taxpayer *qua* taxpayer may not invoke the judicial power to challenge the validity of a statute because in that status he has not sustained and is not likely to sustain any "direct injury" as a result of the statute's enforcement. See *Frothingham* v. *Mellon*, 262 U.S. 447, 488.

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150, 152. Petitioners have not and cannot demonstrate "injury in fact." Their main claim is that unborn children will suffer injury. But petitioners "cannot represent a class of [which] they are not a part" (*Bailey* v. *Patterson*, 369 U.S. 31, 32-33; *Hall* v. *Beals*, 396 U.S. 45, 49) or on whose behalf they cannot properly speak. Thus, even if unborns have rights that warrant protection (see *Roe* v. *Wade*, 410 U.S. 113), the named plaintiffs lack standing to assert such rights. *Tileston* v. *Ullman*, 318 U.S. 44; *Warth* v. *Seldin*, 422 U.S. 490.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.